SUPREME COURT OF PENNSYLVANIA.

TAYLOR *v.* MURPHY.

SYLLABUS.

Mechanics' Liens—Right of Sub-Contractor to file Lien.—The decision in Shroeder *v.* Galland, 134 Pa., 277, that where the contractor has stipulated that no lien shall be filed, the sub-contractor is bound by the stipulation and has no right of lien, approved. Such an agreement violates no rule of public policy. A statute that should disregard its obligation and authorize the entry of a lien for work or materials in violation of its terms would seem to be within the prohibition of the Constitution of Pennsylvania, Art. 1, § 17, which declares that no law impairing the obligation of contracts shall be passed. It might also be within the limitation on the powers of the several States, found in Art. 1, § 10, of the Constitution of the United States.

But there is no waiver of the right to enter a lien or covenant that none shall be entered, where the contractor has merely agreed "to release and discharge the said houses from the operation of all liens, either for materials furnished, or work done in the construction of the same."

It is no defence against the lien of a sub-contractor that the building was erected under a written contract, in which the contractor was bound to provide all materials and labor and complete the building, for a fixed sum, to be paid when the building was finished; and that he did not finish it.

A sub-contractor or material-man is entitled to a lien for what his materials or labor are reasonably worth, although the aggregate of the liens against the building is greater than the contract price.

A general allegation in an affidavit of defence in a suit on a mechanics' lien, that the materials for which the lien is filed were not such as the contract required, is insufficient.

STATEMENT OF THE CASE.

A *sci. fa.* having been issued on the lien filed by the plaintiffs, who had furnished materials for the house in question upon the order of the contractor, the owner filed an affidavit of defence, which the Court below held insufficient and entered judgment for the plaintiffs. Defendant appealed, specifying for error this action of the Court.

The other facts sufficiently appear in the opinion.[1]

[1] Reported in 30 Weekly Notes, 27; 1 Adv. Rep., 540.

OPINION OF THE COURT.

WILLIAMS, J., April 11, 1892.—The plaintiff furnished lumber and manufactured woodwork, for the erection of defendant's dwelling-house, on the order or direction of Christy, the contractor. The mechanic's lien, on which the writ of *scire facias* in this case is issued, was entered for the amount of material so furnished. The defendant interposed an affidavit of defence, in which several reasons were urged as sufficient to prevent the entry of a judgment and carry the case to a jury for trial. These may be stated as follows:

(1) That the house was erected under a written contract, in which Christy was bound to provide all material and labor, and complete the house, for the sum of $3,750, to be paid when the building was finished; that he did not finish it, and for that reason nothing was due to him or to a sub-contractor under him.

(2) That the aggregate amount of the liens entered against the building, together with the cost of completing it, would exceed the contract price, and that the liens, if sustained, should abate proportionably, in order to bring the total cost down to the contract price.

(3) That no liens could be entered, under the express stipulations of the contract with Christy, the builder.

(4) That the material furnished was not such as the contract required, and, in consequence of its defective character, the house was worth $125 less than it otherwise would have been, for which sum, at least, there was a good defence.

It is urged that the principle announced in Schroeder *v.* Galland[1] is broad enough to cover all the propositions contained in the affidavit, and makes a reversal of the judgment entered in the Court below necessary. In Weaver *v.* Sheeler,[2] we held that all persons furnishing labor or materials for the erection of a building were bound to take notice of the title of the apparent owner. If he was an intruder without right, the lien of

[1] 134 Pa., 277. [2] 118 Pa., 634.

contractor and sub-contractor must alike fall. If he held an equitable title only, the lien would bind such title as he had, and no more. In Schroeder *v.* Galland, we went a step further, and held that, where the contractor had stipulated that no lien should be filed, he could not confer a right upon his sub-contractor that he did not possess. The contract between the owner and the contractor is the source from which the right of the sub-contractor is derived under the provisions of the law, and it is self-evident that a stream cannot rise higher than its source. The agreement of the builder, to provide all the labor and materials for the erection of a building, and look for his security solely to the personal responsibility of the owner, leaving the building unincumbered by liens, is a valid and binding one. It violates no rule of public policy. A statute that should disregard its obligation, and authorize the entry of a lien for work or materials, in violation of its terms, would seem to be within the prohibition of the Constitution, Art. 1, section 17, which declares that no law impairing the obligation of contracts shall be passed. It might also be within the limitation on the powers of the several States, found in Art. 1, section 10, of the Constitution of the United States. We are thoroughly satisfied, therefore, with Schroeder *v.* Galland, and our only inquiry is, whether this case falls within the rule there laid down.

The third ground of defence, stated in the affidavit, puts the case in the precise condition of Schroeder *v.* Galland; but, on turning to the clause in the contract relied on to raise the question, it will be seen that it is insufficient. It contains the express promise of the contractor, "to release and discharge the said houses from the operation of all liens, either for materials furnished, or work done in the construction of the same." This is not a waiver of the right to enter a lien, or a covenant that none shall be entered. It is merely a promise to release and discharge "such liens as may be entered, prior to the day when payment in full shall be made to the contractor." He cannot demand the payment of the balance due upon his contract until he has performed the undertaking to release

and discharge the liens that may have been entered against the building. This does not fall within the rule invoked. Neither do the first and second grounds of the defence.

It would be unreasonable to require one who was called on to furnish material for the foundation or walls of a house, to anticipate the cost of all the materials to be furnished by others, and of all the labor to be done, in order to the full completion of the structure. He can know, and he must take notice, as we have seen, of the title of the apparent owner, and of the general character of the agreement under which the contractor is proceeding to build. He can know, and must take notice of the general character of the building, and of the materials and labor proper to be used in its construction. He must see to it that the materials he supplies are such as may be reasonably needed for, and used about, such a building, both as to their quantity and quality; but here his responsibility ends. Subject to these qualifications and conditions he may bind the building for what his materials or labor may be reasonably worth.

This brings us to the last position taken by the defendant, viz., that he is entitled to set off the sum of $125 upon the plaintiff's demand, for the reason that the materials were not such as the contract required. The only provision in the contract on which this averment can rest, is that which follows: "The construction, workmanship and materials furnished are to be similar to that used and performed in construction of house No. 139 Lafayette Street, Germantown." The materials furnished by the plaintiff included doors, sash, shutters and ornamental woodwork, as well as flooring, shingles, joists and other rough lumber, amounting in the aggregate to nearly $900. If the affidavit had alleged a deficiency in the quality of the doors, or any other portion of the materials furnished, as compared with similar materials used in No. 139 Lafayette Street, a different question would have been raised. As it is, the allegation of a deficiency in quality relates to the materials generally, and the extent of the deficiency is measured, not by a difference in the value of the articles furnished as

compared with those contracted for, but by an alleged difference in the value of the house as a whole, on account of defectiveness in the material generally. The Court below was right in treating this averment as altogether too general.

Judgment affirmed.

MECHANICS' LIENS.

The Penna. Act of June 16th, 1836, P. L., 696; Purdon, 1157, enacts that "every building erected . . . . shall be subject to a lien for the payment of all debts contracted for work done, or materials furnished for or about the erection or construction of the same." "Every person entitled to such lien shall file a claim or statement of his demand, in the office of the prothonotary of the court of common pleas of the county in which the building may be situate;" which claim must set forth, *inter alia*, "the names of the party claimant and of the owner or reputed owner of the building, and also of the contractor, architect or builder, where the contract of the claimant was made with such contractor, architect or builder;" also, "the amount or sum claimed to be due, and the nature or kind of the work done, or the kind and amount of materials furnished, and the time when the materials were furnished, or the work was done, as the case may be." There is no provision for the filing or recording of the contract between the owner and the general contractor; nor any statement that the claims of the material-man or sub-contractor shall in any way be subject to the terms of the contract between the owner and the general contractor.

Probably in consequence of the decision in Haley *v.* Prosser, 8 W. & S., 134, that a special agreement under all circumstances deprives the party of his lien, and that it is only when there is no agreement in which the terms of the bargain are particularly stated that the mechanic is supposed to contract on the basis of the law and rely upon the lien for his security, the Act of April 16th, 1845, P. L., 538, Purdon, page 1160, pl. 19, was passed, which enacts as follows: "It is hereby declared that the provisions of the Act approved June 16th, 1836, entitled 'an Act relating to the lien of mechanics and others upon buildings' according to the true intent and meaning thereof, extend to and embrace claims for labor done and materials furnished and used in erecting any house or other building, which may have been or shall be erected under or in pursuance of any contract or agreement for the erection of the same, and the provisions of the said Act shall be so construed; and no claim, which has been or may be filed against any house or other building or the lien thereof, or any proceedings thereon shall be in any manner affected by reason of any contract having been entered into for the erection of such building, but the same shall be held as good and valid as if the building had not been erected by contract."

In Young *v.* Lyman in 9 Pa. St.,

449, decided in 1848, Young filed a lien against Lyman for work done under a written contract for the erection of certain houses, in which contract there was a clause as follows: "All materials to be paid for four months after the completion of the job, and Young to give security in $500 that no lien shall be entered on the houses;" which stipulation the Court ruled to be "that no other person or sub-contractor shall file a lien," and that Young was therefore entitled to his lien. In 1880, in the case of Long *v.* Caffery, 93 Pa. St., 526, Long expressly stipulated "that no mechanic's or other lien shall be entered against said building by the said Long or the material contractor or workmen." The court decided that Long had waived his right of lien, and that this agreement on his part was not dependent upon a covenant by the owner to insure the building and assign the policy of insurance to Long as collateral security. In 1888 the case of Scheid *v.* Rapp, 121 Pa. St., 593, came before the Court. Here the contract contained the following provision: "And the said Dionis Rapp hereby for himself, his heirs, executors and administrators (covenants) that he will not suffer or permit to be filed in the Court of Common Pleas of Lancaster County any mechanics' lien or liens against the said building for the period of six months after its completion." It was argued that under the decision of Young *v.* Lyman, *supra*, Rapp had not waived his right of lien; but the Supreme Court held that he had, saying: "The sole question is whether the contractor by his covenant waived the right to file, or authorize a lien to be filed, in his own favor. We think he did. While the phraseology of the stipulation is different from that of Long *v.* Caffery, 93 Pa., 526, the legal effect of both is the same. The lien under consideration was necessarily filed by the plaintiff below, himself, or by his sufferance or permission. In either case, it was as clearly a violation of his covenant as if he had suffered or permitted any mechanic or material-man to file a lien." Young *v.* Lyman was not cited by the Court, but may be considered to have been overruled by this decision.

The case of Campbell *v.* Schaife was decided by the District Court of Allegheny County, in 1851, and is reported in 1 Phila., 187. In this case a lien was filed by sub-contractors, and the owners filed, *inter alia*, a plea "That the debt claim ought not to be levied on said house, because the plaintiffs were sub-contractors under one James Millinger (impleaded with the owners), who had undertaken to erect said house for the owners, and to furnish materials, and to receive payment therefor *partly* in merchandise and *partly* in money, in one, two and three years after the completion of the building; concluding with an averment of readiness, verification and prayer for judgment, etc." The Court decided that this plea was vicious in not stating specifically the amounts to be paid in goods and money respectively, and the kind of goods and times of payment; and that it was a plea in bar and not in suspension of the remedy; that it should have been a plea in abatement, postponing the right to a *sci. fa.* on the lien; the Court saying: "The best position in which the owners of the building can ask to be placed, is to consider them as

having made the contract themselves with the sub-contractor, as to the time and mode of payment. Surely the lien law is broad enough in its terms to allow a lien even with a stipulated mode of payment. The lien law then stands as security for the payment in *this mode:* and not until a failure thus to pay, does the party acquire a right to the remedy by *sci. fa.*, and then he may claim a judgment for the payment in money. . . . Even on a lien, payable by instalments, part of which may not be due, I see no great difficulty in framing the pleadings, verdict, and judgment in such a manner that the contract shall be enforced according to its terms. Nor does the difficulty seem insurmountable where part of the suspended payments are to be made in goods." LOWRIE, J., further said, that as the informality of the plea might readily be amended, and the counsel had discussed the question which would have to be decided if it were a plea in abatement, he would take up that question: "Are sub-contractors in the erection of a house affected, as to the time and mode of payment, by the contract made between the owners and the builder?

"The law creates a lien for all debts contracted for work done and materials furnished for the erection of the house; and this phraseology proves that this lien, like all analogous liens, is founded on contract express or implied. And here, contrary to the rule as to other liens, the law, in another clause, gives a lien even in favor of a sub-contractor. On what principle is it founded?

"It must be on contract with the owner, either directly or indirectly; for it is only thus that one man can ever acquire a claim upon the property of another. And in this way the connection is plain. The owner contracts with a builder to erect a house on certain terms, and the builder makes a sub-contract with a material-man to supply the materials. The claim of relationship consists of but two links, the second of which hangs by the first, and will bear no greater weight. The sub-contractor comes in by reason of his direct contract relation to the builder, and the right of lien of the former for his claim, is, *pro tanto*, substitutionary to that of the latter. As against the owner, the terms of the principal contract, and, as against the builder, the terms of the sub-contract, limit and qualify the lien of the sub-contractor, so as to prevent his claim from abating the terms of either contract. And it is because the lien of the sub-contractor is by way of abrogation to the right of the builder, that the latter is made a party to the proceeding.

"The justice of this limitation of the right of the sub-contractor is very plain; for, if it were otherwise, no man could ever build a house with any certainty as to the cost of it, unless he employed all the workmen, and purchased all the materials himself. He might find it built of an entirely different character from that contracted for, and yet have to pay the sub-contractor, though the builder could have no claim upon him. He might contract for a house at $1,000 and find liens established against it for $2,000.

"If such were the case, no prudent man would make a contract to have a house erected, except with a builder who had ample means to secure him against liens, and such men only could obtain the most de-

sirable contracts. The allowance of any lien at all to a sub-contractor is a special privilege, granted only in case of buildings; and it is not unreasonable to require him to look to the principal contract, to ascertain whether it is such as to justify him in becoming a contractor under it.

"The argument that the law and the principal contract make the builder the agent of the owner, proves nothing. Suppose the fact to be so; still his agency is only special, limited by the terms of the contract. He is to employ men to build the house in the manner and on the terms there indicated. For anything beyond that he exceeds his authority and does not bind his principal. If, under a contract to build a brick dwelling-house, he erects a wooden stable, I do not see how he or his sub-contractor can claim any lien. Yet the latter could do so, if the sub-contract were not dependent on the principal one.

"To construe the law as is contended for by the plaintiffs, would be to place the owner in the relation of a protector to all those who contribute to the erection of the house. But the law treats every man as capable of taking care of himself. It constitutes no relation of protection or dependence among men who have arrived at legal discretion. It looks only to their contract relations, and adapts its remedies to the enforcement of these; and, if necessary for this end, it takes hold of the debtor's effects in the hands of other persons. In cases like the present it does more; for it gives a contingent lien on those effects in advance of their being earned."

This case was not cited, it is believed, in any opinion of the Supreme Court until 1890, in the case of Schroeder *v.* Galland, hereafter referred to. In Mr. Miller's edition of Sergeant's Mechanics' Lien Law, page 75, the decision is spoken of in this way: "If this decision be the law, it establishes a most important doctrine. Every person employed by a contractor is presumed to have seen his contract, and as against the owner and his house, his claim cannot rise beyond it, or depart from its terms. We believe, however, that this decision is not regarded in practice or usage."

In the case of Odd Fellows' Hall *v.* Masser, 24 Pa. St., 507 (1855), the Court laid down *inter alia* the following propositions:

(1) "That where materials for the construction of a building, contracted for in good faith, are delivered to the contractor for the building, a lien for the price of the materials may be filed against the building, although the materials were not used in the construction, nor were of the right quality for a specific use, if that fact was unknown to the seller, and they were of such a character as to justify their use in the construction generally.

(2) "That where the materials furnished are of the kind that would induce a careful, prudent and skilful man, acquainted with the building, to believe that they could be used in its erection, and if they could in fact be usefully employed in its construction, then the material-man is not bound to inquire into the character of the materials which the contractor had agreed with the owner of the building to use in its construction."

In Given *v.* The Bethlehem Church, 11 W. N. C., 371, the Court of Common Pleas No. 4, Philadel-

phia County, in an opinion by ELCOCK, J., held that where a subcontractor had gone on the bond of indemnity of the principal contractor to the owner against all claims and liens for work and labor done and materials furnished, he could not himself file a lien; to this extent the opinion goes, although the decision was only that there had been error in the rejection of the bond when offered in evidence; and the opinion also says that a breach of the condition of the bond would be a set-off and good defence to the *sci. fa.* on the lien.

Attention is called to the language of TILGHMAN, C. J., in the case of Hinchman *v.* Graham, 2 S. & R., 169, where he decided that lumber furnished for a building, but delivered at the carpenter shop, at a distance from it, and not used in it, gave a lien. "I was once inclined to think that the lien might be restrained to the materials *actually used in the building*. But, on reflecti on, I find that such a construction is not warranted by the words of the law, and would operate unjustly on those who furnished the materials; for how can they tell the exact quantity that the building will require, or what control have they over the purchaser after delivery?"

In the opinion in Haley *v.* Prosser, *supra*, the Court said: "The object originally, in the contemplation of the Legislature, was to secure those who furnished labor or materials to a mere builder, *without knowing the owner*, or having the opportunity to secure themselves."

It has been decided, under the Act of 1845 above quoted, that one who does not contract directly with the owner must furnish the particulars as to the nature or kind of the work done, and the kind and amount of materials furnished, as required by the 12th Section of the Act of 1836, *supra;* although one contracting directly with the owner need not give these particulars when the claim is filed on a special contract under the Act of 1845: Russell *v.* Bell, 44 Pa. St., 47; Lee *v.* Burke, 66 Pa. St., 336. A like decision was rendered in Gray *v.* Dick, 97 Pa. St., 142, in regard to the similar act of March 24, 1849, P. L., 675.

Such was the current of decision when the case of Schroeder *v.* Galland, 134 Pa. St., 277, came before the Supreme Court in 1890. In this case the plaintiff was a sub-contractor under Olmsted, the general contractor. In the written contract between Olmsted and the husband of the owner, made with her consent, Olmsted agreed that he would erect "and deliver over to the party of the first part, free of all liens and encumbrances, or any claims whatever that might arise under any action of the party of the second part, or his legal representatives, under this contract, a basement, two-story and steep-roof residence," etc. The contract contained also the following stipulations: "These payments (on the estimates of the architect), by the party of the first part, are to be made to the party of the second part, provided the wages of all artisans and laborers, and all those employed by or furnishing materials to the said party of the second part, on account of this contract, shall have been paid and satisfied; the party of the second part hereby agreeing to furnish such evidence

of payment and satisfaction if required so to do, by the party of the first part, prior to each payment. . . . In case the party of the second part fails to pay and satisfy all and every legal claim and demand as aforesaid against the *building*, the said party of the first part may, if he deems proper so to do, retain from the moneys due, if any, to the party of the second part, enough to satisfy such claims and demands, and if there be not enough due or coming, then the said second party covenants and agrees to pay the same. Said second party also agrees to pay sub-contractors and parties furnishing materials on account of this contract, *pro rata*, at each estimate."

The Supreme Court held that the plaintiff was not entitled to a lien.

In the opinion, GREEN, J., said: "A sub-contractor for construction is certainly bound to know the kind of building that is to be erected, the materials of which it is to be built, the price to be paid for it, and the manner and times of payment. He cannot, under a contract for the erection of a building at a cost of $1,000, furnish work and materials to the amount of $5,000. He cannot furnish wood as material for the erection of a building to be built of marble, or stone, or bricks. Nor can he furnish unsuitable materials, even of a kind demanded by the contract, and entitle himself to a lien therefor.

. . . . . .

"Of course, it cannot be questioned for a moment that a sub-contractor who undertakes the construction, in whole or in part, of a building, under a contract with the principal contractor, is absolutely bound by all the plans and specifications expressed in the original contract of the owner with the builder. He must conform to the original contract in all matters and in the minutest detail, precisely as the builder would be obliged to do. It is most obvious that he cannot depart, in any respect, either from the designs, the dimensions, the materials, the plans, shapes and sizes that are expressed in the original contract; and the reason is most manifest: He is the representative of the builder. He undertakes to perform the contract of the latter with the owner, either in whole or in part, and of course he must conform to that contract in every particular."

"There is no hardship to sub-contractors in enforcing a provision prohibiting liens against them, because they are bound to know, by necessity, all the terms of the contract made by their principal in any event, and they therefore know of the prohibition. But the owner has no opportunity of protecting himself, because he cannot know to what persons the contract, or portions of it, may be sub-let. He has done all he could do by prohibiting liens, in plain terms, in his written contract; and of that prohibition all sub-contractors are bound to know, and may abstain from contracting on such terms if they choose. We know of no good reason for giving such an extraordinary privilege to sub-contractors as the right to repudiate one of the most important terms to which their contracts are subject, or of taking away from an owner the right to insist upon the performance of his contract according to its literal terms. We take away houses and lands from their owners by means of some secret lien or trust of which they know nothing, by

applying the doctrine of constructive notice; and it would be passing strange for us to hold that the right of a sub-contractor for part of a building is of so sacred a character that it shall not be bound by the express limitations of a written contract, under which, and by force of which, his own contract must be performed. His right of lien has no existence at common law or in equity. It is a creature of statute alone; but the statute confers upon him no special prerogative to transcend the most familiar principles of the law, and to claim privileges which are denied to all other citizens in the determination of their contract rights. Let it be granted that a contractor, as well as the owner, has power to bind the building by a lien for work and materials; we have never yet held that he may confer that right upon a mere sub-contractor under him when, by the terms of his own contract, he does not possess the right himself. The question is one of first impression. Heretofore it has never been before us. It is with us now, and we are at liberty to decide it in accordance with our views of right and justice, and with those principles of the interpretation and administration of contracts between citizens which we unfailingly apply in all other cases."

The following cases have been held to be within the rule laid down in Schroeder *v.* Galland:

Benedict *v.* Hood, 134 Pa. St., 289. While this case might have been wholly rested upon the decision in Scheid *v.* Rapp, *supra*, the Court expressly put it upon the case of Schroeder *v.* Galland. Here the material clauses of the agreement were as follows: "And it is further agreed that the party of the first part will not at any time suffer or permit any lien, attachment or other encumbrance, under any law of this State or otherwise, by any person or persons whatsoever, to be put or remain upon the building or premises into or upon which any work is done or materials are furnished under this contract, for such work and materials, or by reason of any other claim or demand against the party of the first part; and that any such lien, attachment or other encumbrance, until it is removed, shall preclude any and all claim and demand for any payment whatsoever under or by virtue of this contract. . . .

"And further, the last instalment shall not be payable, unless, in addition to the architect's certificate, a full release of all claims and liens against the said building and its appurtenances and the said lot of ground, for all work done and all materials furnished in or about the construction and erection of said building, has been delivered by the party of the first part, and unless the architect shall certify that all damages or allowances which should be paid or made by the party of the first part have been deducted from the said instalment, and also a certificate from the party of the first part that all claims and demands for extra work or otherwise under or in connection with this contract have been presented to the architect. . . .

"The payment shall be made by the party of the second part in instalments, when, and in the amounts approved by the architect: *Provided*, That no instalment shall be less than three hundred dollars, and that a margin of twenty per cent. shall always remain for the final instalment; that

is, there shall at all times be at least twenty per cent. of the work done which is unpaid for. And the sub-contractors, mechanics and material-men, except those who have executed the bond of Joseph C. Pharoh, as sureties for this contract, shall first give a release of lien for all work done and material supplied by them up to date of such payment."

Dersheimer *v.* Maloney, 143 Pa. St, 532. This was a lien filed by a sub-contractor. The contract between the owner and the principal contractor contained the following provisions:

"(2) . . . . Eighty-five per cent. will be paid as the work progresses on labor and materials, in monthly payments, according to and upon the estimate of the architect. The proprietor reserves the right to pay bills, deducting fifteen per cent. until completion: *Provided*, That in each case of payment a certificate shall be obtained from the architect; . . . . and, *provided further*, That in each case a certificate shall be obtained by the contractor from the clerk of the office where liens are recorded, signed and sealed by the clerk, that he has carefully examined the records and finds no liens or claims recorded against said work; neither shall there be any legal or lawful claims against the contractor in any manner, from any source whatever, for work or materials furnished on said works."

"(7) The proprietor will not, in any manner, be answerable or accountable for loss or damage that shall or may happen to said work or any part or parts thereof respectively, or for any of the materials or other things used and employed in finishing and completing said works; or for injury to any person or persons, either workmen or the public, or for damages to adjoining property." . . . .

Tebay & Klingensmith *v.* Kilpatrick & Company, Limited, 1 Adv. Rep., 66. Here the contract between the owner and principal contractor provided that the contractor should "not sub-let the work, or any part thereof, without consent in writing of the proprietors," or owners; and also that said owners should "not in any manner be answerable or accountable for . . . any of the materials or other things used and employed in finishing and completing said works."

Wilkinson *v.* Brice, 1 Adv. Rep., 481. Here the agreement contained a clause identical in language with that first quoted from Benedict *v.* Hood, *supra*.

Bolton *v.* Hey, 1 Adv. Rep., 608. In this case paragraph IX of the contract provided for payment to the contractor upon the certificate of the architect "and upon sufficient evidence that all claims upon the building for workor material up to the time of each and every payment are discharged, or if the party of the first part shall require it, either a full or partial release, at the option of and satisfactory to the said party of the first part, of all liens against said premises on the part of all persons, if any, who, up to that time, have delivered materials for use in, or performed work upon, the said building, and before the final payment hereafter specified shall become due, to furnish to the said party of the first part, a full, complete and perfect release of all liens which may lie against the building or premises on account of work done or materials

furnished thereto, including the liens of the said party of the second part."

A supplemental agreement, also in writing and executed at the same time, provided:

"It is further agreed that the said building shall be built, finished and delivered over to the party of the first part free of all liens and encumbrances, or any claims whatever that might arise under any action of the party of the second part, or his legal representatives under this contract, and that the provisions of the ninth section of said contract shall not be taken to subject the said building to any liability for the payment for labor or materials furnished in and about the erection thereof, or the said party of the first part to any liability therefor, other than the payment of the contract price to the said party of the second part as therein provided."

Besides the principal case, the following cases have been held not to be within the rule of Schroeder and Galland. Murphy *v.* Morton, 139 Pa., 345, where the contract was: "The said party of the second part . . . . will deliver the said houses, so completed, to the party of the first part, free, clear and discharged of and from all claims, liens of mechanics and material-men, and from any and all charges whatsoever; and, to insure on his part the performance of this part of the contract, the party of the second part hereby agrees to furnish to the owner, at each payment after the first payment, satisfactory receipts, showing that the proceeds of all preceding payments have been devoted exclusively to paying for materials and workmanship used in the construction of the said pair of houses; and, before the last or final payment shall be due or payable, the party of the second part shall furnish the party of the first part with releases from sub-contractors and material-men, and from any and all persons having a right of lien or action against the said houses, or the property on which they are located, for any work or materials furnished and used in their construction."

Loyd & Company *v.* Krause & Sons, 1 Adv. Rep., 240. Here the contract contained the following clause: "Neither shall there be any legal or lawful claims against the party of the first part (the general contractor) in any manner, from any source whatever, for work or materials furnished on said work." In the preceding part of the same section of the contract, there was a provision that the last payment of the contract price need not be made until "a complete release of liens shall have been furnished by the party of the first part."

Willey *v.* Topping, 1 Adv. Rep., 241. Here the contractor, subsequent to his contract, but before the sub-contractor furnished the material for which he claimed a lien, had released his right to file a lien.

It is respectfully submitted that these cases are not reconcilable with each other. Take the leading case on each side, Shroeder *v.* Galland and Murphy *v.* Morton; what essential difference is there in the language of the contracts?

It will be noticed that the doctrine of Shroeder *v.* Galland is largely built upon the theory that the sub-contractor is presumed to know all the details of the contract between the owner and the general contractor, and is bound by all the

terms of that contract. In the principal case, while the facts are stated not to bring it within Schroeder and Galland, yet the doctrine of Schroeder and Galland is expressly recognized and affirmed; but in the last paragraph but one of the opinion the reasoning on which Schroeder and Galland is based is departed from. The Court no longer says that the sub-contractor "is absolutely bound by all the plans and specifications expressed in the original contract of the owner with the builder. He must conform with the original contract in all matters and in the *minutest detail*, precisely as the builder would be obliged to do. It is most obvious that *he cannot depart in any respect* either from the designs, the dimensions, the materials, the plans, shapes and sizes that are expressed in the original contract." The Court now says, "He can know, and he must take notice, as we have seen, of the title of the apparent owner, and of the *general character* of the agreement under which the contractor is proceeding to build. He can know, and must take notice of, the *general character* of the building, and of the materials and labor proper to be used in its construction. He must see to it that the materials he supplies are such as may be reasonably needed for and used about *such* a building, both as to their quantity and quality, but here his responsibility ends. Subject to these qualifications and conditions he may bind the building for what his materials or labor may be reasonably worth." This sounds like a return to Odd Fellows' Hall *v.* Masser, *supra*.

Shaver *v.* Murdock, 36 Cal., 298, and Henley *v.* Wadsworth, 38 Cal., 356, are cited in Schroeder *v.* Galland as deciding "that the right of the sub-contractor to a lien is controlled by the terms of the original contract, and he is presumed to have notice of the terms of that contract." These decisions were both made under the California Act of April 26, 1862, P. L., 384, which Act, in its first section, provides that the lien given under it shall only be "to the extent of the original contract price;" and, in Section 5, that "whenever, by the provisions of the original contract, the payments to an original contractor are to be made by instalments," those claiming a lien must give notice to the owner before the instalment becomes due to entitle them to any payment out of it; and, under Section 10, the owner cannot anticipate any payment to the prejudice of the lien claimants. The point decided in Shaver *v.* Murdock was that the owner could not vary his original agreement with his contractor so as to affect the interests of a material-man, without timely notice to the material-man. Henley *v.* Wadsworth decided that the owner who paid his contractor by instalments, in accordance with the contract between them, and without any notice from lien claimants, was, under the Act, protected in so doing. It is evident that neither of these cases support the decision in Schroeder *v.* Galland.

But in Bowen *v.* Aubrey, 22 Cal., 566, it is distinctly ruled that a sub-contractor cannot claim a right of lien where such right has been waived by the original contractor. CROCKER, J., on page 570, says: "When an owner of property has contracted with another to erect a building, or other superstructure, or

do any other work, or furnish materials therefor, all sub-contractors and parties agreeing to furnish labor or materials to such original contractor do so with reference to such original contract, in subordination to its provisions and to the rights of the respective parties thereto, so far as they relate to the liability of the owner or the property, or so far as they rely on such liability; and any agreement such parties may make with such original contractor is, so far as relates to the owner or the property, subject to all the terms, agreements, conditions and stipulations of such original contract; and the owner or the property cannot be held liable or bound to any extent beyond the terms of the original contract, or such new or further contract as he may make with the original contractor or the sub-contractors."

This case was decided under the California Acts of April 19, 1856, and April 22, 1858, which, like the subsequent Act of 1862, seem to contemplate that the owner can only be called upon to pay the unpaid balance of his contract price, and that the sub-contractor must know what this is and the terms of payment. See Phillips on Mech. Liens, § 272.

See also Henry *v.* Rice, 18 Mo., App., 497 (overruled in Henry & Coatsworth Co. *v.* Evans, 97 Mo., 47); Shaw *v.* Stewart, 43 Kan., 572; Bardwell *v.* Mann, 46 Minn., 285, 289.

The statute which is undoubtedly referred to in the opinion in the principal case, and indicated therein to be unconstitutional, is the Act of June 8, 1891, P. L., 225, which was passed with the idea of restoring the law to what it had been supposed to be before the decision in Schroeder *v.* Galland. The two sections, of which this Act consists, are as follows:

"Section 1. Be it enacted, etc. That no contract which shall hereafter be made for the erection of the whole or any part of a new building with the owner of the lot on which the same shall be erected, shall operate to interfere with or to defeat the right of a sub-contractor who shall do work or shall furnish materials under agreement with the original contractor in aid of such erection, to file a mechanics' lien for the amount which shall be due for the value of such work or materials furnished, unless such sub-contractor shall have consented in writing to be bound by the provisions of such contract, with the owner, in regard to the filing of liens. Without such written consent of the sub-contractor all contracts between the original contractor and the owner, which shall expressly or impliedly stipulate that no such lien shall be filed, shall be invalid as against the right of such sub-contractor to file the same.

"Section 2. All persons contracting with the owner of ground for the erection or construction of the whole or any part of a new building thereon, shall be deemed the agent of such owner in ordering work or materials in and about such erection or construction, and any sub-contractor doing such work or furnishing such materials shall be entitled to file a mechanics' lien for the value thereof within six months from the time the said work was completed by said sub-contractor, notwithstanding any stipulations to the contrary in the contract between

the owner and the contractor, unless such stipulation shall have been consented to in writing by such sub-contractor."

It is suggested by WILLIAMS, J., that this statute is within the prohibition of Article 1, § 17, of the Constitution of Pennsylvania; and that it might also be within the prohibition of Article 1, § 10, of the Constitution of the United States. On examining the sections of the Constitutions referred to, it is evident that the only clause which could have been in the mind of the Judge is the one, in identical language in both Constitutions, prohibiting the State from passing any "law impairing the obligation of contracts." But it needs but a moment's consideration of the Act in question to see that it cannot be held unconstitutional on this ground, as the Act, by its terms, is only applicable to contracts made *after* its passage and the inhibitions of the constitutions only protect contracts made *before* the passage of the law which seeks to impair them. See Lehigh Water Company *v.* Easton, 121 U. S., 388; Hare on Constitutional Law, page 676.

The question then arises, is the Act in question unconstitutional on any other ground? It will here be necessary to consider for a moment the general nature of mechanics' lien laws. They are purely statutory. They have been accepted as reasonable by the people, because they seem like little more than an extension of the common law lien, which anyone has who adds to the value of a chattel in his possession by expending his labor upon it. Legally their validity does not seem to have been often called into question. The principle upon which, when attacked, they have been supported is well expressed by Chief Justice SHAW, in Donaghy *v.* Klapp, 12 Cush., 440: "Before the year 1851, no one could create such a lien by a building contract, except the owner or person having an interest therein, to the extent of such interest. But by that statute one who had contracted with the owner to erect a building had power, by his sub-contract with another for the whole or part of the work, to create a similar lien on the estate in favor of such sub-contractor. . . . Before that statute took effect as law, the contract gave a lien to Hilt (the original contractor) only, which was the act of the owner charging his own estate. But under the operation of that statute, a precisely similar contract by the owner of land would give the contractor a power to bind the estate by other liens in favor of sub contractors for labor thereon. Such liens in favor of such sub-contractors, would equally bind the estate by consent of the owner; because such a contract, by force of the existing law, when it was made, of which the owner is presumed to be conusant, gives his irrevocable power to his contractor to charge and bind his estate; and when such power is executed by the actual making of such sub-contract for labor, it is in law the act of the owner hypothecating his own estate to the extent of the price of such labor." See also Phillips on Mechanics' Liens, § 65, and Laird *v.* Moonan, 32 Minn., 358. The contractor is made the general agent of the owner, with authority to bind, not the owner personally, but the building, in favor of a sub-contractor, by a lien for reasonable and suitable materials, although (in the absence of

an express statutory provision) the aggregate of the sub-contractors' liens exceeds the contract price. Such powers are, under the law, implied to have been given to the contractor by the owner. But where the owner in his contract has expressly stated that he gave the contractor no such powers, can the Legislature declare that the contractor shall, nevertheless, as to sub-contractors and material-men, be held to have such powers? And this, even where the sub-contractor has actual notice and full knowledge of this provision in the contract between the owner and the original contractor; for, in the statute in question, the only way in which the sub-contractor can be held by such a provision in the original contract is by his consent thereto in writing.

The constitutional provisions under which this Act will most probably be attacked, are the clause of the Fifth Amendment to the Constitution of the United States, which provides that "No person shall be deprived of life, liberty or property, without due process of law;" and the First Section of the First Article of the Constitution of Pennsylvania, which classes among the inherent and indefeasible rights of all men, that "of acquiring, possessing and protecting property." Certainly it may be argued with considerable force that the effect of this Act will be to limit the owner's enjoyment of real estate; and to put it out of his power to make the ordinary and useful improvements to his property without subjecting himself to the risk of having it burdened with debts which he did not personally contract, for improvements for which he has fully paid, and which debts were made a lien upon the property by the acts of one to whom he had expressly refused to give any power to pledge the property for the payment of these debts, and of which refusal the persons to whom the debts are owing had full knowledge when they contracted them. This seems like carrying the doctrine of implied agency beyond all proper limits.

But why invoke the doctrine of agency at all? Cannot the Legislature say that every building erected with the authority of the landowner shall be subject to a lien for work and materials in favor of those who furnish them, which lien they alone can waive? "As soon as owners of lots ceased to be their own builders, they put it in the power of the persons employed by them to occasion losses to mechanics and material-men which they ought not to bear; and it was to remedy this mischief that the Legislature established the principle that materials and labor are to be considered as having been furnished on the credit of the building, and not of the contractor. The principle is not only a just but a convenient one. Whether the builder be the *agent* of the owner or an *independent contractor*, his appointment to the job creates a confidence in him which was not had before; and the consequences of a false confidence ought not to be borne by those who had no hand in occasioning it." GIBSON, C. J., in White *v.* Miller, 18 Pa. St., 52. This case is well worth careful reading.

Probably the Act would be free from objection if it had provided that the lien in favor of the sub-contractor should not exist where the original contract stipulated against such liens and was filed or recorded in some public office. See

Kellog *v.* Howes, 81 Cal., 170. But under the statute as it reads, there is no possible way for the owner to prevent liens attaching, except by obtaining the written consent of persons who may be absolutely unknown to him until after the mischief has been done.

Whether or not such an Act will be held constitutional, it seems to the writer, must depend very much upon what the Court before whom the Act comes shall deem to be good public policy. If the Court considered that the lien of the mechanic is something to which he is reasonably entitled, and which tends to the well-being of the community, the statute will probably be upheld: Henry & Coatsworth Co. *v.* Evans, 97 Mo., 47; Merrigan *v.* English, 5 L. R. A., 37; Colpetzer *v.* Trinity Church, 24 Neb., 113; Albright *v.* Smith, 51 N. W., 590. *Contra*, Spry Lumber Co. *v.* Trust Co., 77 Mich., 199.

BENJAMIN H. LOWRY, *Philadelphia.*

EDITORIAL NOTES.

BY W. D. L.

THE NEW JURISDICTION OF THE SUPREME COURT OVER POLITICS. — Boyd *v.* Nebraska *ex rel.* Thayer, decided by the Supreme Court of the United States on the first of last February, and digested in our abstracts of cases for this number, excited considerable interest on account of the political importance of the result, since the decision involved the question of who had the right to the Governorship of Nebraska. It will probably be remembered, however, not on this account, but because it meets and decides for the first time an important question relating to the jurisdiction of the Supreme Court. The facts of the case were briefly these:

The Constitution of the State provided that no one was eligible to hold office in the State who had not been for two years previous to his election a citizen of the United States. James A. Boyd received the highest number of votes at the fall election of 1890, but after his inauguration he was ousted from his office by the Supreme Court of the State on the ground that he had not been for the two years previous to his election a citizen of the United States. Boyd then appealed to the Supreme Court of the United States. The Chief Justice, Mr. Justice